IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROLANDO BELTRAN	§	
	§	
Plaintiff,	§	
	§	**5:15-CV-1019-RP**
v.	§	
	§	
UNION PACIFIC RAILROAD COMPANY	§	
	§	
Defendant.	§	

PLAINTIFF ROLANDO BELTRAN'S RESPONSE IN OPPOSITION TO DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MOTION FOR SUMMARY JUDGMENT [DOCUMENT 42]

TO THE HONORABLE JUDGE ROBERT PITMAN:

COMES NOW, Rolando Beltran, Plaintiff in the above-entitled and numbered cause, and hereby responds in opposition to his employer's, Union Pacific Railroad Company's Motion for Summary Judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. Plaintiff respectfully requests that upon careful consideration of the pleadings, evidence of record and arguments of counsel, Defendant's dispositive motion [Document 42] be in all respects denied and this matter proceed to trial.

I.
PROCEDURAL BACKGROUND

1. On or about January 9, 2015 Defendant *Union Pacific Railroad Company* terminated *Rolando Beltran* from his position of foreman. Mr. Beltran challenged his termination by filing an appeal (grievance) and also by filing a timely charge of discrimination against *Union Pacific Railroad Company* with the appropriate administrative agencies, including the United

States Equal Employment Opportunity Commission (hereinafter "EEOC") and the Civil Rights Division of the Texas Workforce Commission (hereinafter "TWC") identified as charge number 451-2015-01495.[1] This was based on gender (male), race (Hispanic), disability (morbid obesity) and age (year of birth 1972), over 40 (45 years old).

2. On or about September 28, 2015 Plaintiff received a Notice of Right to File a Civil Action (hereinafter "Notice") from the TWC indicating that his administrative remedies had been exhausted and that he could therefore file suit within the next 60 days[2].

3. Plaintiff timely filed suit on October 23, 2015 under the Texas Labor Code, Chapter 21. No federal claims were asserted. Defendant *Union Pacific Railroad Company* answered on November 18, 2015 and removed the case to this Court on November 19, 2015 invoking the Court's diversity jurisdiction [Document 1].

II.
UNDISPUTED FACTS

4. Plaintiff worked for *Union Pacific Railroad Company* in San Antonio, Texas for almost eleven (11) years, commencing employment in 2004 as a car man apprentice. ***See* Exhibit 1**, deposition of Rolando Beltran at page 25, lines 3-16 (hereinafter "R. Beltran, p. ____" or "Exhibit 1, p. ___").

5. On December 24, 2010 Plaintiff was terminated by Union Pacific Railroad Company after a random drug test came back positive for "cocaine metabolites". (R. Beltran depo. at p. 37). Plaintiff agreed to a reinstatement agreement on or about April 25, 2011 which permitted him to be rehired on the condition that he enroll in a rehabilitation facility for at least twenty-eight (28) days and be subject to random drug testing after his reinstatement for the next sixty (60) months. R. Beltran depo. at p. 40-41. Plaintiff completed the rehabilitation program and was reinstated as agreed. R. Beltran depo. ***Id.***, 41-42.

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[1] A copy of the Charge is annexed to Plaintiff's Original Petition as Exhibit 1 and is incorporated by reference as if fully set forth herein.

[2] A copy of the Notice is annexed to Plaintiff's Original Petition as Exhibit 2 and is incorporated by reference as if fully set forth herein.

6. He was later promoted to car foreman in 2014. Plaintiff earned income in excess of of $80,000.00 per year plus health, life insurance and retirement benefits. ***Id.***

7. As a foreman, Plaintiff was generally responsible for supervising the car men at the railroad yard. Mr. Beltran performed these duties and executed his job responsibilities in a dependable and capable manner. Plaintiff was well qualified for the position because he possessed the requisite skills, experience, education and other job related requirements for the position. ***Id.***

8. On or about November 14, 2014, Plaintiff was requested by *Union Pacific Railroad Company* to submit to a drug test. Mr. Beltran obliged and the results were negative. On or about November 20, 2013, Plaintiff was again requested to submit to another urine drug test and he did so. R. Beltran, p. 48.

III.
DISPUTED QUESTIONS OF FACT

9. Then, on or about November 25, 2014, Plaintiff received a call from Dr. R. Barnett, the railroad's Medical Review Officer (MRO) who requested Mr. Beltran identify the prescribed medications he was taking and also the over-the-counter medications he was taking when he provided the urine sample. Plaintiff answered as requested: a Vick's inhaler for treatment of asthma; Robitussin for cough, and Nyquil-D for Mr. Beltran's cold-like symptoms. The Medical Review Officer also asked about his ***prescribed medications*** and Mr. Beltran stated them. Mr. Beltran had been prescribed Phentermine 37.5mg to treat his obesity, Colchicine for his gout, and Symbicort for his asthma.

10. Mr. Beltran had already been drug tested 57 times in the four (4) years prior to this last urine test and each one was negative for any prohibited substances. ***See*** **Exhibit 2**, Employee Testing History. Dr. Barnett cut the telephone interview short and told Mr. Beltran he had tested positive for amphetamine/methamphetamine. Mr. Beltran was in disbelief and immediately questioned this. The next day Mr. Beltran informed the Railroad that there must be some mistake and was told he could request a re-test of the split sample. Mr. Beltran immediately submitted a written request for a re-test of his urine specimen.

11. On January 7, 2015, the railroad conducted an investigation hearing regarding the allegations of drug use by Mr. Beltran. During the investigation hearing a review of Mr. Beltran's medications was entered into the record which included the prescribed medications and the over-the-counter medications described above. ***See*** **Exhibit 10**, Transcript of Investigation by Union Pacific Railroad held on January 7, 2015.

12. Mr. Beltran was not represented by counsel at the hearing because he had been informed that union counsel would help him. This was unfortunately not the case; he met his co-worker representative shortly before the investigation hearing. The representative conceded he had not prepared for the hearing in any meaningful way.

13. During the hearing, Mr. Beltran testified that he could not explain the positive test result other than to relay that his doctor opined that the prescribed medications and the over-the-counter medications Mr. Beltran had ingested prior to the drug test caused a "false positive" for amphetamines or methamphetamine. This was supported by the written opinion of Michael Zeitlin, M.D. Dr. Zeitlin's written professional medical opinion is attached hereto as **Exhibit 3**. In response, Dr. Rany Barnett, the MRO testified that Beltran tested positive for "street meth" without any discernable scientific or medical basis whatsoever. "Street meth" is a derogatory term which Mr. Beltran understood as a racial slur.

14. Despite Mr. Beltran's best *pro se* efforts the Hearing Officer issued a Notification of Discipline Assessed dated January 9, 2015 stating "permanent dismissal" and Level 5 Violation Upgrade.

15. Based upon information and belief, the Union Pacific Railroad Company has a history of discriminating against older Hispanic males and employees with disabilities. Mr. Beltran is a Hispanic male and has a disability of morbid obesity for which he was prescribed Phentermine. The MRO and the Railroad knew that Mr. Beltran had been prescribed these appetite suppressants and that these were *likely to cause a false positive on the type of testing performed* by the Railroad and still proceeded with the termination. In fact, Mr. Beltran learned that the Railroad has a history of using their drug testing and their MRO as a way of terminating older Hispanic males like Mr. Beltran. R. Beltran depo. ***Id.***, p. 90, l. 1-7; ***see also*** **Exhibit 9**, Defendant's chart of Union Pacific Railroad employees identified by gender, race, age, date of hire, and date and reason for separation/termination.

16. MRO R. Barnett testified he had no recollection of his conversation with Mr. Beltran, ***See*** **Exhibit 4**, deposition of Dr. R. Barnett, p. 36, l. 17-20. He further testified that he does about thirty (30) to forty (40) such telephone conferences per day. He testified he was not surprised if five (5) out of the past six (6) Hispanic males he had tested (in South Texas) were all positive for drugs. ***See*** **Exhibit 4**, deposition of Dr. R. Barnett, p. 58, l. 4-18.

17. Plaintiff was replaced by someone outside the protected class, *i.e.*, someone who was (i) younger; (ii) and or non-Hispanic, and (iii) not disabled.

IV.

18. The alleged positive test results for amphetamines/methamphetamine are vigorously disputed. R. Beltran depo. at p. 48; **Exhibit 2**, Employee Testing History.

19. On November 25, 2014 Dr. Randy Barnett, Union Pacific's Medical Review Officer ("MRO"), who works for University Services which contracts with Union Pacific Railroad Company called Rolando Beltran and asked him to disclose the prescription and over-the-counter medications he was taking at the time. R. Beltran depo. at p. 55; deposition of Randy Barnett, D.O. at p. 38-41 attached as **Exhibit 3**. MRO Barnett appeared rushed and distracted during the brief telephone conversation with Mr. Beltran. Beltran testimony from Investigation Hearing at p. 57. He interrupted Mr. Beltran and told him that he had tested positive for amphetamines or methamphetamine. When Mr. Beltran objected to this MRO Barnett asked if he wanted the split sample tested. Mr. Beltran said that he did and the conversation was abruptly ended.

20. Mr. Beltran was terminated two days after the investigatory hearing. After his termination, Rolando Beltran investigated this matter because he was convinced that an error had occurred. Several co-workers and former co-workers were interviewed. Additionally, union officers were interviewed concerning other instances of testimony by medical review officers used by the railroad.

21. During this research Plaintiff and his counsel discovered that Dr. Randy Barnett, was indicted in the United States District Court for the Eastern District of Pennsylvania and subsequently convicted for the illegal sale of prescription drugs. ***See* Exhibit 5**, Judgment in a Criminal Case. Moreover, this conviction caused the Pennsylvania Board of Medical Examiners to discipline Randy Barnett, D.O. The public record also shows that the U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services "CMS" revoked Dr. Barnett's Medicare and Medicaid billing privileges. Dr. Barnett appealed these rulings and the rulings were sustained by the U.S. Department of Health and Human Services' Departmental Appeals Board, Civil Remedies Division on May 8, 2008. ***See* Exhibit 6**.

22. These felony conviction(s) and disqualifications by the U.S. Department of Health and Human Services are directly relevant to Dr. Barnett's credibility in this drug testing case.

23. Plaintiff is not casting stones here, but the conviction, discipline and disqualification are now material questions of fact. Moreover, this witness's credibility has been challenged both on the record and off the record on racial grounds. In this case, Mr. Beltran was specifically offended by Barnett's testimony at the investigatory hearing to the effect that the test results could not be a false positive because it was not Phentermine but rather "street meth". This derogatory term has no discernable basis in the scientific evidence before the Court. ***See*** Declaration of Dr. Michael Zeitlin, **Exhibit 3**. When Barnett was questioned about this at the investigatory hearing Dr. Barnett testified that the result could not be a false positive based on Phentermine, Cholchicine, Symbicort or the over-the-counter medications Mr. Beltran was taking. Specifically, he testified as follows:

> **(Barnett) Answer:** "Well, Vicks inhaler can give a positive for methamphetamine but not the D-methamphetamine.
>
> Question: Okay. What would be the difference in that?
>
> **(Barnett) Answer:** Well, methamphetamine, there's two isomers. There's the L and the D isomer. Vicks inhaler contains over 80 percent L isomer of methamphetamine.
>
> Question: Okay?
>
> **(Barnett) Answer:** His test positive for D-methamphetamine at 72.3 percent so Vicks inhaler wouldn't account for this methamphetamine result.
>
> Question: Alright, sir.
>
> **(Barnett) Answer:** If it was over 80 percent L it would, but it is not."

Therefore, even by Barnett's own testimony the test results are well within the margin of error for enzyme linked immunoassay testing or gas chromatography testing.

24. Plaintiff, Beltran is further troubled by the railroad's shifting alleged non-discriminatory reasons for their termination. First, they stated unequivocally that it was a positive test result but then on October 9, 2015, the railroad explained that:

> "If Claimant [Rolando Beltran] truly had a legitimate reason to be on medication or illicit drug he should have and could have revealed that to MRO Barnett when they discussed the test on November 25, 2014 and Claimant would have had a prescription for such." ***See*** **Exhibit 7**, Union Pacific Railroad letter to David Neff, General Chairman ARASA dated April 9, 2015.

Plaintiff has been unable to find any evidence in the hearing record or the depositions of Barnett, Beltran or the documentary records for this assertion that Rolando Beltran was asked by Dr. Barnett for evidence of a prescription for Phentermine and when Beltran did not produce it he ruled it a positive test result. Plaintiff believes that this conversation occurred off the record between the Railroad and MRO Barnett. The significance of this is that the railroad [and Barnett's] alleged non-discriminatory reasons are changing from their original claim that the termination was based solely on the results of the urine drug test.

25. Then, slightly more than one year later, the Chairman of the arbitration panel in Mr. Beltran's case, Public Law Board No. 5514, Award Number 101, and NMB Case No. 101, titled The American Railway and Airway Supervisors Association and Union Pacific Railroad Company:

> "The Board has reviewed the voluminous record before us, including the medical and testimonial evidence on the record. Under the unique circumstances of this case and entirely without precedent to any future cases of this nature, we find that Claimant should be returned to work...with seniority and other benefits intact."
>
> Signed by Elizabeth C. Wesman, Chairman, dated December 22, 2016.

***See* Exhibit 8**, Arbitrators' Decision (decision requires Mr. Beltran to forego his right to back pay or attorney fees).

V.
PRIMA FACIE ELEMENTS FOR DISCRIMINATION CLAIM UNDER TEXAS LABOR CODE

26. In discrimination cases that have not been fully tried on the merits, courts apply the burden shifting analysis established by the U.S. Supreme Court. *McDonnell Douglas Corp. McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973). To establish a prima facie case of employment discrimination, the plaintiff must show:

1. He was a member of a protected class;
2. He was qualified for his employment position;
3. He was subject to an adverse employment decision; and,
4. He was replaced by someone outside the protected class, or he was treated less favorably that similarly situated member of the opposite class (disparate treatment cases).

Michael v. *City of Dallas*, 314 S.W.3d 687, 690-91 (Tex. App. - Dallas 2010, *no pet.*).

27. In this case, Rolando Beltran was a Hispanic male over 45 with a known disability (morbid obesity). He also satisfies the second prong in that there is no doubt he was well qualified for his employment position because he was promoted on February 24, 2014 (R. Beltran, p. 28, line 18) to foreman, one year before his wrongful termination. With regard to the third prong, Rolando Beltran again satisfies this because the railroad's termination of his employment after eleven (11) years of faithful service constitutes an adverse employment decision. Lastly, Rolando Beltran has shown in his deposition testimony that he was replaced by someone outside the protected classes or he was treated less favorably than similarly situated members of the opposite class (disparate treatment cases). Specifically, Rolando Beltran testified that:

> **(Beltran) Answer:** "We've had other employees that because of their obesity, you know they've had heart attacks or whatever or seizures and they've gotten retired as medical. I do better myself by taking these pills and I'm being discriminated against because I've been pulled out of service because of this.
>
> (Wilson) Question: Okay. So you're saying you feel you were discriminated against based upon your weight?
>
> **(Beltran) Answer:** That's correct.
>
> (Wilson) Question: I've seen it described as morbid obesity based upon your height and weight.
>
> **(Beltran) Answer:** That's correct.
>
> (Wilson) Question: What is your height and weight right now?
>
> **(Beltran) Answer:** I'm 5'6" and I am at 298 pounds, Beltran, p. 68, l. 12-25.
>
> (Wilson) Question: Beltran, p. 69, l. 1. Now you said you've seen other employees – I want to understand what you were saying there. You've seen other employees that take the retirement because of obesity or how are you comparing yourself to those other employees? I don't quite understand what your saying there.
>
> **(Beltran) Answer:** I mean I'll give you an example. We had an employee by the name of Theresa Garcia. She got a mild stroke. She had gained a lot of weight which made her impossible to do her job, and after getting that stroke she was medically retired.
>
> (Wilson) Question: Okay. Because of some physical condition she had she wasn't able to perform her duties and had to stop working at the railroad. Is that what you're telling me?
>
> **(Beltran) Answer:** That's right.

Then, when asked to explain why he believed he had been discriminated against based upon his sex (gender), Mr. Beltran testified as follows:

> **(Beltran) Answer:** Beltran, p. 70, l. 23. "I mean, they gave that opportunity of Theresa Garcia to retire medically. I'm a male. That opportunity was not offered to me."

28. With regard to disability discrimination in violation of the Texas Labor Code, Mr. Beltran is contending that although he did not request a specific accommodation from Union Pacific Railroad, his employer knew that he was trying to deal with his obesity on his own. Mr. Beltran's supervisor knew that he was trying to lose weight and had been prescribed appetite suppressants to do this.

29. Additionally, if we look at who replaced Rolando Beltran, after his termination on January 9, 2015, the evidence shows that he was replaced by Rudy Engel (Beltran, p. 71). Mr. Beltran further testified that he was well over forty (40) at the time of his termination and replaced by Rudy Rengel who was in his twenties, "not even out of his apprenticeship" and the railroad put Rengel to do his job.

> **(Beltran) Answer:**"Well I mean the guy was still an apprentice, never been to derailments because they don't have much derailments in Laredo. I mean he's not fully trained car foreman to do his duties and he's the one that ended upon replacing me."

Beltran, p. 73, l. 8-12.

Mr. Beltran also made it clear that he had reported racial slurs on prior occasions. Beltran, p. 76, l. 13-16. He reported these through the Union Pacific EEO hotline. He went on to explain that a co-worker who was called in to cover for Mr. Beltran during his absence due to illness "started telling everybody I'm a drug addict". Beltran, p. 77, l. 1-2. Mr. Beltran's complaint was sent to the EEO office. Beltran, p. 77, l. 4-9. The matter was handled informally by Michael Smith, the director of Mr. Beltran's department.

30. When asked if Mr. Beltran's physical condition limited him from performing any major life activities:

> (Wilson) Question: Beltran, p. 78, l. 8. "...What I mean by this is respiratory conditions, circulatory conditions, things that you're getting treatment from the doctor on?

> **(Beltran) Answer:** Yes.
>
> (Wilson) Question: What?
>
> **(Beltran) Answer:** I suffer from sleep apnea.
>
> (Wilson) Question: Okay.
>
> **(Beltran) Answer:** I have to wear a CPAP machine every night because of this.
>
> (Wilson) Question: Does that prevent you from functioning in your daily life?
>
> **(Beltran) Answer:** Well, me using that mask helps me go through, I mean, wake up better, feeling better, rested.
>
> (Wilson) Question: Right, exactly I mean, that -- with the assistance of the CPAP, the sleep – I take it –
> **(Beltran) Answer:** The CPAP machine.
>
> (Wilson) Question: – it's a CPAP –
>
> **(Beltran) Answer:** That's correct. Beltran, p. 78, l. 8-25.
>
> **(Beltran) Answer:** No. I have shortness of breath and I was taking Symbicort for asthma. I mean, I'm a big guy. Beltran, p. 80, l. 6

Mr. Beltran further explained that he had lost over thirty (30) pounds. Beltran, p. 81, l. 7. Mr. Beltran also testified that his "obesity has prevented [him] from having a girlfriend. Beltran, p. 82, l. 1-2.

31. Mr. Beltran further testified that he had been tested over fifty-five (55) times. Beltran, p. 84, l. 7-8. Each test had a breath test and a urine analysis test and each one was negative for any prohibited substances for over four (4) years prior to his termination. ***Id***.

32. Once the plaintiff has established a prima facie case of discrimination the burden shifts to the defendant to show the employee was terminated for a legitimate non-discriminatory purpose. If the defendant proffers a legitimate reason for the adverse employment decision the burden shifts back to the plaintiff to show either:

1. The reasons stated by the employer was pretext for discrimination, or;
2. The defendants reason while true was only one reason for its conduct and discrimination is another motivating factor (mixed motive).

In this case, the MRO's conclusion that Mr. Beltran tested positive for amphetamine/methamphetamine is suspect and not believable under the facts and circumstances of this case. Specifically, Dr. Barnett testified that Mr. Beltran's prescriptions and over-the-counter medicines could not have caused a false positive yet he apparently told the employer that he based this on Mr. Beltran's inability to produce a prescription. This, plus Barnett's credibility make this an issue uniquely suited for determination by a jury.

33. In the context of discrimination based on disparate discipline, the disciplined and undisciplined employees misconduct must be of comparable seriousness. This would require the employee to show that his misconduct was nearly identical to that of an employee from the opposing class who was retained. ***See*** *Flores* v. *City of Liberty*, 318 S.W.3d 551, 554 (Tex. App. - Beaumont 2010, *no pet.*).

34. In the summary judgment context a plaintiff does not have to prove pretext but must merely establish that a genuine issue of material facts exists to avoid judgment. Summary judgment will be improper if the plaintiff makes a prima facie case and produces sufficient evidence for a jury to disbelieve the employer's stated reason for discharge. ***See*** *Baker Hughes Oil Field Operations, Inc.* v. *Williams*, 360 S.W.3d 15, 22-23 (Tex. App. - Houston [1st Dist.] 2011, *pet. denied*). ***See*** Texas Labor Code 21.051, *et seq.*

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Rolando Beltran respectfully prays that this Court deny Defendant's Motions for Summary Judgment as set forth above and for such other and further relief, both general and special, at law or in equity, to which he may be entitled.

Respectfully submitted,

/s/ Edward L. Piña

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment [Document 42] has been served via CM/ECF delivery to the following:

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on this 24rd day of January, 2017.

/s/ Edward L. Piña

EDWARD L. PIÑA